91-1946

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILLIAM URABAZO,

Petitioner,

--against--

UNITED STATES OF AMERICA, The Department of the Interior; The Honorable MANUAL LUJAN, Secretary of the Interior; Bureau of Indian Affairs; WILLIAM P. RAGSDALE, Acting Assistant Secretary - Indian Affairs; WALTER MILLS, Director, Anadarko Area Office; and CLEM E. CEARLY, Superintendent, Anadarko Agency, in their Capacity as Federal Officials,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Tenth Circuit's Policy of Permitting a Federal Agency to Invoke the Statute of Limitations Defense in These Circumstances Improperly Excludes an Important Question of Federal Law Which has not Been but Should be Settled by This Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The Order and Judgment of the Court of Appeals for the Tenth Circuit is reproduced at page 1a of the Appendix to this Petition. The Court of Appeals' denial of rehearing is appended at 16a.

JURISDICTION

The Order and Judgment of the Court of Appeals was entered on October 21, 1991. Appellant's Petition for Rehearing was denied on January 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

28 U.S.C. Sec. 2401(a) and Fed. R. Civ. P. 12 (b)(1) are appended at 17a.

STATEMENT OF THE CASE

1. Historical Foundation -- 1901 to 1970

Mr. William Urabazo lived the majority of his life as a member of the Wichita Indian Tri-

be of Oklahoma. His status as an enrolled member of the Wichita Tribe was taken away as a result of actions initiated by the Department of Interior, Bureau of Indian Affairs ("BIA") in the early 1970's.

Mr. Urabazo's grandfather, Adolphus Araspar, was recommended for adoption into the Wichita Tribe by a Department of Interior letter dated May 23, 1901. (Memorandum in Opposition to Motion to Dismiss, Disputed Material Facts at 1, filed 9/5/90) The adoption of Adolphus Araspar into the Wichita Tribe was approved on July 3, 1901 and he was allotted land on the Wichita Reservation on July 4, 1901 by authority of the Commissioner of Indian Affairs. (Id.at 2) Oklahoma Tract Books list Adolphus as a "Wichita Allottee" and specifically refers to a letter issued by the Secretary of the Interior -- "941 See Secry's Letter July 2, 1901 - 106043. (Id.) The Tract Book information was obtained from the Public Library, Lawton, Oklahoma through the efforts of Mr. Urabazo and

unequivocally list Adolphus as a "Wichita Allottee" with an assigned allotment number of "941".

Early on, the adoption of Adolphus Araspar into the Wichita or the Affiliated Bands of Indians was assaulted as to its validity. A 1902 challenge to the adoption was concluded by decision of the Acting Commissioner of Indians on June 11, 1902 which dismissed it by citing: "[t]he adoption of Adolphus Araspar by the Wichita Indians was authorized by the Secretary of the Interior July 3, 1901." (Emphasis added.) (Id.) Fee patent to the allotted land of Adolphus Araspar was awarded to him as a "Wichita Indian", under the authority of President Woodrow Wilson, on August 24, 1917. (Id.)

For a period encompassing approximately seventy (70) years, the descendants of Adolphus Araspar knew themselves to be members of the Wichita Indian Tribe with their names listed on all available documentation as Indians eligible to receive

federal benefits pursuant to this status. In fact, the BIA certified Lucy Araspar, Mr. Urabazo's mother and also a descendent of Adolphus Araspar, as a member of the Wichita Tribe of Indians of Oklahoma on October 11, 1956. (Id. at 3)

2. BIA Decisions and Tribal Actions

The BIA began its actions that negatively impacted on Mr. Urabazo's tribal membership in the Wichita Tribe on or about September 3, 1970. (Id.) The record does not reflect that the Wichita Tribe initiated any kind of action toward Mr. Urabazo's enrollment prior to the BIA's blood quantum or erroneous enrollment determinations as found in BIA letters dated September 3, 1970, March 30, 1971 or January 25, 1972. In effect, the BIA initiated its probe into the historical underpinnings of Adolphus Araspar's adoption without urging by the Wichita Indian Tribe.

The March 30, 1971 BIA letter from the Commissioner of the Indian Affairs to the BIA Area Director for the Anadarko Area was in response to

the Anadarko Agency Superintendent's request "for clarification of the authority of the Superintendent in determining the eligibility of applicants for Bureau services who possess the blood of tribes for which he has not record." (Brief of Federal Appellees, Ex. 12 at 1; Also SEE Order and Judgment at 5) The memorandum cites a finding that Adolph Araspar possessed no Indian blood. (Order and Judgment at 5 - 6) It is obvious that the initial thrust of the BIA in examining the tribal member status of Mr. Urabazo was confined to matters of Indian blood quantum. Later, this uninvited thrust by the BIA broadened to include an issue of erroneous enrollment.

Without knowledge that the BIA had launched a concerted effort toward undermining his Indian blood quantum, Mr. Urabazo applied for educational benefits from the BIA as a member of the Wichita Tribe. (Id. at 4) Almost fifteen (15) months after the initial unsolicited September 3, 1970 BIA inquiry into the blood quantum matter, Mr. Uraba-

zo's unexpected denial of BIA educational benefits first divulged to him the March 30, 1971 memo which made a finding that his ancestors possessed no Indian blood. (Id.) As explained below, the BIA letter of January 25, 1972 included as a basis for his denial of educational benefits both the lack of Indian blood quantum and the erroneous enrollment issue.

Lucy Araspar Urabazo, William Urabazo's mother, sensed that there was some question posed by the BIA as to her family's blood quantum and, hence, enrollment status with the Wichita Tribe. She wrote a letter, dated January 6, 1972, to the BIA seeking to clarify if the BIA was drawing its sights on her status as a Wichita Indian. (Brief of Federal Appellant at 7) Ignoring numerous documents that showed Adolphus Araspar as a "Wichita allottee", the BIA responded to Mrs. Araspar's inquiry on January 18, 1972. It cited to her that BIA records reflected that her father, Adolphus Araspar, was an original allottee of the Caddo

Tribe. (Order and Judgment at 5) This unexpected twist of rationale presented an entirely new basis, erroneous enrollment, for the BIA to draw into question the Araspar's status as members of the Wichita Indian Tribe than that cited in the March 30, 1971 BIA letter from the Commissioner of Indian Affairs to the BIA Director for the Anadarko Area Office. It is obvious that at least until January 18, 1972 there is nothing in the record of federal documents indicating the existence of any actions taken by the Wichita Tribe toward the membership status of Mr. Urabazo. (Brief of Federal Appellant at 7)

The January 25, 1972 letter mentioned above from the BIA to Mr. Urabazo explaining the basis for denying him federal educational entitlement prompted him to respond by letter dated March 19, 1972. (Memorandum in Opposition to Motion to Dismiss, Disputed Material Facts at 3, filed 9/5/90) Further, Lucy Araspar Urabazo requested official notification from the BIA by letter dated

April 27, 1972 as to her status as a member of the Wichita Tribe. (Id.) The BIA acknowledged receipt of her letter on May 4, 1972 and noted that it would take her letter as an appeal of decisions by the Caddo Tribe not to enroll her and informed her that it would contact her when a decision was reached. (Id. at 4) After being spurned by the Wichita Tribe for no apparent reason grounded in Tribal action or law, Mr. Urabazo, his mother, and others drastically affected by the BIA actions sought enrollment in the Caddo Tribe. (Order and Judgment at 6)

In 1973 and in preparation for disbursement of funds awarded the Wichita, Caddo and Delaware Tribes pursuant to a land claim settlement, the Wichita Tribe prepared an updated membership roll that did not include Mr. Urabazo or his mother, Lucy Araspar Urabazo. (Id.) Upon the discovery of Mr. Urabazo that he was omitted from the proposed Wichita Tribal roll, he promptly and timely filed an appeal on May 4, 1973 of his omission

with the President of the Wichita Tribe, Miles Stephenson. (Brief of Federal Appellant at 8) His appeal was returned to him without a decision on its merits.

A letter dated June 5, 1973 from the Superintendent, Anadarko Agency, to the Chief, Tribal Enrollment Section, BIA, refers to the Wichita Executive Committee discovering that none of the Araspars' were descendants of the Wichita allottees, and thus they did not meet the eligibility requirements of the Wichita Tribal governing resolution. (Memorandum in Opposition to Motion to Dismiss, Disputed Material Facts at 4, filed 9/5/90) The June 5, 1973 letter is the first BIA correspondence to the Araspar descendants that mentions any degree of tribal involvement or action.

From September 3, 1970 to June 5, 1973, the BIA correspondence to Mr. Urabazo failed to specify with a requisite degree of particularity the grounds or other purported basis as to why the

Tribe turned its attention toward his enrollment status. A letter dated August 17, 1973 was provided to Lucy Araspar Urabazo which failed to specify that the Wichita Tribe had engaged in any degree of formal action under its own laws and ordinances to affect the member status of the Araspar descendants. The August 17, 1973 letter, with loaded references to the "discovery" by the Wichita Tribe Executive Committee in its roll preparation, was forwarded to the Wichita Tribe without any record attached to it of tribal action, formal resolution, decision or directive on the matter of this purported discovery. It is significant to note that at no time has the BIA ever pointed to a written document, tribal resolution or other evidentiary proof that the Wichita Tribe ever made a decision on the tribal member status of Mr. Urabazo or any of the other Araspar descendants by way of its own laws or ordinances. (Brief of Federal Appellant at 6) In fact, the Wichita Tribe has consistently relied

solely upon the "official" BIA decisions embodied in the 1970 to 1973 letters to deny that the Araspar descendants are not its members. (Memorandum in Opposition to Motion to Dismiss, Disputed Material Facts at 4, filed 9/5/90) The record amply reflects that but for the BIA decisions on Mr. Urabazo's blood quantum and erroneous enrollment of his ancestors he and the other Araspar descendants would still be enrolled in the Wichita Tribe.

3. Jurisdictional Puzzles

At the core of this case are assertions of the BIA that although there was something done by the Wichita Tribe to affect the membership status of Mr. Urabazo, it had no jurisdiction to take corrective action to remedy the wrong. Mr. Urabazo argues that the BIA's actions in making its initial findings and determinations on his legal interest, before any reference to tribal action, and the BIA's admission that it had no jurisdiction over tribal enrollment matters constitutes

action sufficient to toll the Statute of Limitations. (Brief of Federal Appellant at 8; Order and Judgment at 7)

First, the March 30, 1971 letter from the Commissioner of Indian Affairs made factual and legal determinations on the Indian blood quantum of the Araspar descendants. (Order and Judgement at 5 - 6) Apparently, the BIA's actions in establishing an agency policy statement or "rule" toward enacting standards for determining Indian blood quantum in the case of the Araspar descendants were not published in accordance with 5 U. S.C. Sec. 553, as mandated by Section 552.

In September of 1970, the BIA acted intentionally by taking on an independent investigation of the blood quantum of the Araspar descendants. It assumed jurisdiction over the matter.

Next, the January 18, 1972 letter to Lucy Araspar Urabazo states that: "However, decisions concerning tribal membership are the prerogative of the tribe rather than the Bureau of Indian Af-

fairs". (Id. at 5) The BIA rejected jurisdiction over the matter in the same breath that it refers to its March 30, 1971 blood quantum determination.

The August 17, 1973 letter from Raymond V. Butler, Acting Director, Office of Indian Services, BIA, to Lucy Araspar Urabazo again recites the March 30, 1971 findings and determinations on the blood quantum of the Araspar descendants as well as the new erroneous enrollment issue, i.e., that Adolphus Araspar was erroneously placed on the Wichita rolls when he was an original Caddo allottee. (Id. at 6) That August 1973 letter refers to the "discovery" by the Wichita Executive Committee that Adolphus Araspar was allegedly a Caddo allottee but fails to present evidence that the Wichita Tribe had taken formal action under its governing document to disenroll Mr. Urabazo. Butler wrote:

> It is unfortunate that members of your family cannot meet the requirements for membership of either the Caddo or Wichita Tribes. However, there is nothing

> we can do to assist you in this matter since membership in Indian Tribes is a tribal matter.

With no evidence of an independent determination made by the Wichita Tribe as to the blood quantum and erroneous enrollment matters, the BIA intentionally distanced itself from the problem by reciting the well-established principle that the BIA lacks jurisdiction over matters involving tribal enrollment. The denial of jurisdiction came almost immediately after the BIA had made numerous determinations on matters which were the sole reason as to why Mr. Urabazo was summarily booted from the Wichita Tribe and subsequently refused membership in the Caddo Tribe.

With no recourse available within the federal administrative process, Mr. Urabazo formally appealed his omission from the Wichita rolls in May 1973. The appeal was returned to him by the Wichita Tribe unanswered. Mr. Urabazo knew that his status as a member of the Wichita Indian Tribe was withdrawn. However, he was "stiff-armed" by

both the BIA and Tribe with absolutely no meaningful recourse either within the federal or tribal forums to attempt a resuscitation of his status as a member of the Wichita Tribe. Mr. Urabazo realized that he had a cause of action but that he had no place to present it -- he was and is a man caught in a jurisdictional puzzle with no way out.

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit's Policy of Permitting a Federal Agency to Invoke the Statute of Limitations Defense in These Circumstances Improperly Excludes an Important Question of Federal Law Which has not Been but Should be Settled by This Court

A. Important Question of Federal Law

The idea that a tribal member's enrollment status with a particular Indian Tribe may be disturbed without the slightest hint of action by that Tribe pursuant to its own internal laws, ordinances and regulations is hard to reconcile with 5th Amendment concepts of due process of the law and its jurisprudence. It is equally difficult to reconcile such a disenrollment in a case where the only reason for such injurious action arises out

of the actions of a federal agency that were made in excess of its jurisdiction or for strictly limited purposes. It is an important question of federal law where a federal agency, the BIA, draws into question and entirely without tribal provocation an individual tribal member's blood quantum and enrollment status then denies that it has the power to correct its mistake. The jurisdictional issues inherent in such a situation call for an extension of the two (2) circumstances that Federal Courts recognize to toll the commencement of a limitations period on a claim against the United States: (1) when the United States concealed its wrongdoing so the plaintiff did not know and in the exercise of due diligence could not learn of his injury; and (2) when the plaintiff's injury was "inherently unknowable." See Menominee Tribe of Indians v. United States, 726 F.2d at 721; United States v. Sams, 521 F.2d at 429-30.

Historically, decisions regarding enrollment in Indian Tribes have been within their own pro-

vince and not subject to scrutiny by the United States. However, while tribal enrollment actions govern membership for tribal purposes, there may be circumstances where specific provisions of Federal law, such as those governing per capita distributions, for example, require that the BIA determine tribal membership for those purposes. Significantly, Congress has provided mandates for the guidance of the United States when it is necessary to fulfill its federal trust responsibility to Tribes and individual Indians by untaking an examination of a Tribe's enrollment actions. 25 C. F.R. Part 62.

It is a clear that when the BIA provokes, without legal cause, an Indian Tribe to disturb, without formal action under its laws or ordinances, the membership status of a tribal member then concludes that it is powerless to correct the action giving rise to the provocation that a "concealment" has occurred. In certain factual circumstances, as here, a statement by the United

States that it lacks jurisdiction to correct the record of its actions which proximately caused a disenrollment serves as an extremely effective method of concealing its alleged wrongdoing from a plaintiff.

In no other area of subject matter is the law as confusing and arcane as matters dealing with tribal membership, enrollment and blood quantum issues. This area of the law is an amalgam of tribal cultural, historical and political factors that are as diverse as the several hundred federally-recognized tribal sovereigns whose survival depends to a large degree on the expectation that the BIA will not needlessly involve itself into their tribal enrollment concerns. When the BIA does inject itself needlessly or erroneously into a tribal enrollment matter, the situation becomes even more murky.

It could be quite possible for an aggrieved tribal member to fully recognize that he or she has been disenrolled from a Tribe yet never know

either the reasons for the disenrollment or the proper place in which to seek redress to his or her wrong. The jurisdictional issues inherent in the often conflicting tandem interest of the United States and federally-recognized Tribal Sovereigns lend very readily to circumstances of this sort. There is a distinct and palpable harm but no place to redress it.

A BIA finding that it was powerless to take corrective action to clear the record of its erroneous determinations and decisions toward a tribal member that caused his or her disenrollment acts as an extremely effective limitation of a Tribe's right to deal with its enrollment matters unaffected by federal action or illegal interference.

If artfully contrived, the BIA may invade, with impunity, the enrollment process of a Tribe under an artificial "screen" composed of jurisdictionally created "smoke" then withdraw back across the reservation line, wait the requisite six (6)

years and then claim that 28 U.S.C. Sec. 2401(a) bars the claim of one who had absolutely no meaningful recourse to attempt a remedy to his wrong.

The danger inherent in this scenario lies in the potential ability of the BIA to proceed into a prohibited domain without Congressional authorization or the benefit of case precedent. This could well serve as an illegal and covert limitation on the exercise of a Tribe's sovereignty in the area of who it determines as eligible or ineligible for its rolls. Some Tribes believe that when the Great Father in Washington speaks, he always speaks the truth. Such was the case when the Wichita Tribe used the questionable 1970's BIA decisions while denying due process to Mr. Urabazo under its own tribal laws.

B. The Actions of the BIA in These Facts were as Effective as an Act of Concealment of an Alleged Wrongdoing.

It is not subject to dispute that Mr. Urabazo and his mother knew that the BIA drew sights on their tribal membership status and their Indian

blood quantum early in 1972. (Order and Judgment at 7) Likewise, it is not subject to dispute that the BIA expressed its opinion that Mr. Urabazo's family did not meet the qualifications in either the Caddo or Wichita Tribes and that it would do nothing to assist him in securing membership in either the Caddo or Wichita Tribe. (Id.) The BIA made a determination toward his blood quantum and the disputed erroneous enrollment of his ancestor and forwarded a record of its actions to the Wichita Tribe. The Tribe subsequently relied upon the BIA determinations in this regard to act in some still undefined manner to "question" his placement on its proposed tribal roll.

As previously emphasized, there is nothing in the record that proves that the Wichita Tribe ever acted in accordance with its laws and ordinances to formally disenroll Mr. Urabazo. He has never been provided due process under either tribal or federal laws. However, the record does reflect that Mr. Urabazo attempted to appeal his omission

from the newly proposed roll in May 1973 after the BIA repeatedly informed him and his mother that it could not intermeddle in matters of tribal membership. That appeal was returned unaddressed. Mr. Urabazo knew he was injured but he did not know precisely the source of his injury -- actions taken by the Wichita Tribe or by the BIA? Told by the BIA that his only recourse to rectify his problem was in the Tribal forums, he took a timely yet futile appeal of his case to the Tribe. The BIA effectively "shut the door in his face . . . [and] no exit out of the tribal back to the federal forum was possible." (Reply Brief of Federal Appellant at 8)

The Tenth Circuit's Order and Judgment rejects the argument that concealment of wrongdoing may be as effectively foisted upon a plaintiff by directing him to a tribal forum wherein it knows that the likelihood of resolution of the problem are slim to none. The Tenth Circuit focuses upon a denial of an accusation of wrongdoing in holding

that such a denial does not constitute concealment. As the record below reflects, Mr. Urabazo's appeal to the Wichita Tribe upon his discovery that he was omitted from its proposed tribal roll went entirely by the wayside. He may have been cognizant that he was injured by the BIA. However, this federal agency not only denied wrongdoing in expressing its opinion but that it denied it had the authority (jurisdiction) to do anything about it. The effect is the same.

The Tenth Circuit also disregards the record in that Mr. Urabazo has made numerous attempts to seek clarification and assistance from the Wichita Tribe in regards to the problems of the Araspar descendants. He has never ceased in his efforts. The Tribe has repeatedly turned down his oral and written request for it to open up its doors for a good faith resolution of his enrollment problem, using the early 1970 BIA decisions that should have never made as the reason for unceremoniously kicking him off its rolls.

In utter frustration, Mr. Urabazo sought redress from the Federal Courts in 1989 to once again continue his twenty (20) year odyssey that has gone unheeded through no fault of his own. He filed his appeal to the Wichita Tribe as directed by the BIA and bloodied his fist for twenty (20) years in an attempt to get somebody to listen to his plight and have his day in court.

Respectfully Submitted,

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OPINIONS BELOW

TENTH CIRCUIT ORDER AND JUDGMENT*

No. 91-6028

Filed October 21, 1991

[1] Before McKAY, Chief Judge, EBEL, Circuit Judge, and SAFFELS,** District Judge.

**Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. [2] 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals the district court's order of November 8, 1990, entering summary judgment in favor of defendants on plaintiff's claim for

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

declaratory relief. Plaintiff alleged in his complaint that his great-grandmother, Susie Araspar, and his grandfather, Adolphus Araspar, were adopted into the Wichita and Affiliated Band of Indians in 1901. Plaintiff further alleged that certain decisions the Bureau of Indian Affairs (BIA) allegedly made in the early 1970s caused the Wichita Tribe to disenroll him. Plaintiff, therefore, sought a declaration of the following: (1) that the BIA is not authorized to make independent determinations of Indian blood quantum; (2) that the "BIA exercised its purported authority to make the decision affecting Plaintiff's enrollment with the Wichita Indian Tribe by improper and illegal application of 25 C.F.R. Part 62;" and (3) that "the BIA's determination of Plaintiff's [Indian] blood quantum for any purpose is void ab initio." Appellant's App., Doc. 1 at 6. The district court granted the government's motion for summary judgment on the ground that plaintiff's claims were barred by the

statute of limitations set forth in 28 U.S.C. Section 2401(a). We agree that plaintiff's claims were untimely.

Section 2401(a) provides in pertinent part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The limitations period applies to equitable, as well as legal, claims, Christensen v. United States, 755 F.2d 705, [3] 708 (9th Cir. 1985), cert. denied, 476 U.S. 1181 (1986), and it applies to Indians in the same manner as other litigants, Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir.), cert. denied, 11 S. Ct. 75 (1990); see also Menominee Tribe of Indians v. United States, 726 F.2d 718, 722 (Fed. Cir. 1980) (statute of limitations in 28 U.S.C. Sec. 2501). Furthermore, because plaintiff named the individual defendants in their official capacities, we treat his claims against them as claims against the United States,

see Kentucky v. Graham, 473 U.S. 159, 165-66 (1985), and apply section 2401(a) to plaintiff's claims against all of the defendants.

"Unlike an ordinary statute of limitations, Sec. 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." Spannaus v. United States Dep't of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987). "The plaintiff's failure to sue within the period of limitations is not simply a waivable defense; it deprives the court of jurisdiction to entertain the action." Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d at 592; see also Vincent Murphy Chevrolet Co. v. United States, 766 F.2d 449, 452 (10th Cir. 1985).

Although the government should have brought its challenge to the court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) rather than Rule 56, "[t]his procedural obstacle is inconsequential . . . because we review a district

court's decision under both rules de novo." Zumwalt v. United States, 928 F.2d 951, 952 (10th Cir. 1991).

[4] A cause of action "first accrues" for purposes of 28 U.S.C. Sec. 2401(a) "'when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action.'" United States v. Sams, 521 F.2d 421, 429 (3d Cir. 1975) (quoting Japanese War Notes Claimants Ass'n of Phil., Inc. v. United States, 373 F.2d 356, 358 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967); see also Impro Prods., Inc. v. Block, 722 F.2d 845, 850 (D.C. Cir. 1983)(cause of action first accrues for purposes of section 2401(a) "when the 'right to resort to federal court [is] perfected'" (quoting Oppenheim v. Campbell, 571 F.2d 660, 662 (D.C. Cir. 1978))), cert. denied, 469 U.S. 931 (1984).

Plaintiff does not dispute that section 2401(a) applies to his claim, and he admitted in his response to defendants' motion for summary

judgment that "he has known about this claim since 1972 or thereabouts." Appellant's App., Doc. 17 at 5-6. Nonetheless, plaintiff argues that his claim should not be barred by section 2401(a) because defendants' actions tolled the commencement of the limitations period.

The record shows that plaintiff's membership in the Wichita Tribe was called into question in the early 1970s. At that time, plaintiff applied for educational benefits from the BIA as a member of the Wichita Tribe. His mother Lucy Urabazo, also wrote the BIA in January of 1972 seeking a statement that she was enrolled with the Wichita Tribe and asking if there were some question as to whether she and her family were enrolled illegally.

The BIA responded to Mrs. Urabazo's letter on January 18, 1972. It informed her that BIA records showed her [5] father, Adolphus Araspar,

was an allottee of the Caddo Tribe.[1]

> Although the names of many members of the Araspar family have appeared on membership list of the Wichita Tribe through the years, that tribe does not have an official membership roll. The Wichita Executive Committee has recently begun preparation of such a roll under the provisions of the governing document. . . .
>
> Since your father was a Caddo Allottee, not a Wichita allottee, it would appear that you would not be eligible for membership under the criteria quoted above [from the governing document]. However, decisions concerning tribal membership are the prerogative of the tribe rather than the Bureau of Indian Affairs. The Wichita Tribe is currently considering possible changes in the membership criteria, but no final action has been taken yet.

Appellant's App., Doc. 17, Ex. 14 at 1.

The BIA also sent plaintiff a letter on January 25, 1972, denying his request for educational benefits on the ground that he was not a member of the Wichita Tribe. Enclosed with the letter was a copy of a memo written on March 30, 1971, from

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1 Both the Wichita and the Caddo Tribes were once part of the Wichita and Affiliated Band of Indians.

the Commissioner of Indian Affairs to the BIA Director for the Anadarko Area. The memo was in response to the Anadarko Agency Superintendent's request "for clarification of the authority of the Superintendent in determining the eligibility of applicants for Bureau services who possess the blood of tribes for which he has no record." Brief for Federal Appellees, Ex. 12 at 1. The memo states in pertinent part as follows:

> In the specific case of the descendents of Nicholas and Susie Arispi (Araspar), the records on file at the National Archives indicate that Susie was the daughter of Mexican parents who were killed and she was raised by the Wichita Indians and considered one of them. Her [6] husband is listed in the family register as 7/8 degree Mexican and 1/8 degree Pueblo. Their children, therefore, could only be shown as 1/16 degree Indian blood. Susie's son, Adolph Arispi, however, possessed no Indian blood.
>
> The situation of the descendants of Nicholas and Susie Araspi is different from that of descendants of Kiowa and Comanche captives who do not possess Indian blood yet who might be considered as full blood members of either tribe by reason of having been allotted with those tribes. The blood degree of the descendants of captives is deter-

mined in accordance with the Kiowa and Comanche constitutions.

Id. at 2. Thereafter, plaintiff wrote the BIA concerning the denial of his request for benefits.

In 1973, the Wichita Tribe prepared an updated membership roll that did not include plaintiff or his mother. The BIA sent plaintiff's mother a letter in August of that year in response to her earlier letters concerning problems with gaining membership in either the Wichita or Caddo Tribes.[2]

The BIA's letter reiterated that Adolphus Araspar was adopted into the Caddo Tribe, but acknowledged that members of the Urabazo family has been listed on the census rolls as members of the Wichita Tribe for many years. The letter further stated however that "during the preparation of the tribal roll by the Wichita Executive

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2 After the BIA informed plaintiff's mother that its records showed her father was a Caddo allottee, plaintiff and other members of his family sought membership in the Caddo Tribe. The Tribe denied their request.

Committee it was discovered that your family could not meet the eligibility requirements specified in the Wichita resolution governing membership." Id. Ex. 18 at 1-2. The letter discussed [7] the Urabazos' failed attempts to gain membership in the Caddo Tribe and concluded:

> It is unfortunate that members of your family cannot meet the requirements for membership of either the Caddo or Wichita Tribes. However, there is nothing we can do to assist you in this matter since membership in Indian tribes is a tribal matter. Only when authorized by the tribal constitution or other organizational document or in matters involving the disposition of the tribal estate can the Bureau involve itself in matters concerning enrollment as a member of the tribe.

Id. at 2-3. The BIA forwarded a copy of this letter to the Wichita Tribe.

The record indicates that plaintiff was aware of the contents of the correspondence between his mother and the BIA. Therefore, he knew as early as 1973 that the BIA's records showed his grandfather was a Caddo, not a Wichita, allottee; that the BIA was of the opinion that plaintiff's family

did not meet the qualifications for membership in either the Caddo or Wichita Tribes; that the Wichita Tribe had struck him from its membership roll; and that the BIA would do nothing further to assist plaintiff's family in securing membership in either tribe. Nonetheless, plaintiff argues that the limitations period on his claims for declaratory relief from the BIA's purported decisions about plaintiff's Indian blood quantum and his eligibility for tribal membership did not begin to run in 1973.

The circumstances upon which plaintiff relies in arguing that the commencement of the limitations period was tolled are as follows: (1) the BIA had no jurisdiction to make independent determinations of Indian blood quantum; (2) a reasonable person in plaintiff's position would not know "with a reasonable degree of [8] certainty the kind of injury he suffered and that party or parties responsible for causing the injury or harm," Brief of Plaintiff-Appellant at 11; and

"the BIA led Appellant Urabazo into a well-founded belief that he could not address his problem to it and that his only legal recourse was within the tribal forums," Reply Brief of Plaintiff-Appellant at 7.

The gist of plaintiff's first argument is simply that he has a meritorious claim. Even a meritorious claim, however, must be filed within the limitations period. See Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d at 591.

Plaintiff's second and third arguments are related. Plaintiff contends that because the BIA admitted during the district court action that it had no jurisdiction to make any independent determinations of Indian blood quantum yet continued to deny that it did anything wrong--the BIA contended that it merely relied on tribal decisions about plaintiff's tribal membership--plaintiff did not know he had been injured or who had caused his injury. Plaintiff also argues that because the BIA said it could do nothing for him and that tribal

membership was a tribal matter, that BIA effectively "shut the door in his face . . . [and] no exit out of the tribal back to the federal forum was possible," Reply Brief of Plaintiff-Appellant at 8. We are not persuaded by plaintiff's arguments.

Federal courts have tolled the commencement of a limitations period on a claim against the United States in two circumstances: (1) when the United States concealed its wrongdoing so the plaintiff did not know and in the exercise of due diligence could [9] not learn of his injury; and (2) when the plaintiff's injury was "inherently unknowable." See Menominee Tribe of Indians v. United States, 726 F.2d at 721; United States v. Sams, 521 F.2d at 429-30.

The record does not reflect that the BIA concealed its alleged wrongdoing from plaintiff. The BIA's letters clearly expressed both the BIA's opinion as to plaintiff's qualification for tribal membership and the basis for that opinion. That

the BIA denied it committed any wrongdoing in expressing its opinion does not constitute "concealment" so as to toll the commencement of the limitations period. See Peck v. United States, 470 F. Supp. 1003, 1019 (S.D.N.Y. 1979) ("[A] denial of an accusation of wrongdoing does not constitute concealment."). Likewise, the injury plaintiff allegedly suffered as a result of the BIA's actions was not "inherently unknowable." To the contrary, plaintiff knew of his injury when the Wichita Tribe excluded him from its membership roll in 1973.

Furthermore, although the BIA may have closed the door on any further informal administrative relief, it did not foreclose all federal remedies. Plaintiff could have brought the present declaratory action against the BIA in 1973, or at least within six years thereafter, just as easily as he brought it in 1989. Plaintiff has not pointed to any facts that changed or came to light between 1979, when the limitations period ended, and 1989

that affected his ability to bring suit against the BIA for its alleged wrongdoing. Even if plaintiff were ignorant of his legal right to sue that BIA before 1979, such ignorance would not toll [10] the commencement of the limitations period. Menominee Tribe of Indians v. United States, 726 F.2d at 720-21.

The district court correctly ruled that plaintiff's action was barred by the six-year limitations period set forth in 28 U.S.C. Section 2401(a). The court, however, should have dismissed the action for lack of jurisdiction rather than entering judgment in favor of defendants and against plaintiff.

Therefore, the judgment of the United States District Court for the Western District of Oklahoma is MODIFIED to reflect a dismissal for lack of subject matter jurisdiction.

Entered for the Court

Dale E. Saffels
District Judge

COURT OF APPEALS FOR THE TENTH CIRCUIT'S
DENIAL OF REHEARING

ORDER Filed January 24, 1992 No. 91-6028

Before McKAY, Chief Judge, EBEL, Circuit Judge, and SAFFELS*, District Judge.

*Honorable Dale E. Saffels, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

Upon consideration of appellee's petition for rehearing filed in the captioned case, the petition is denied.

Entered for the Court

s/Robert L. Hoecker,
Clerk

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

28 U.S.C. 2401(a):

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

Fed. R. Civ. P. 12(b)(1):

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . .